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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

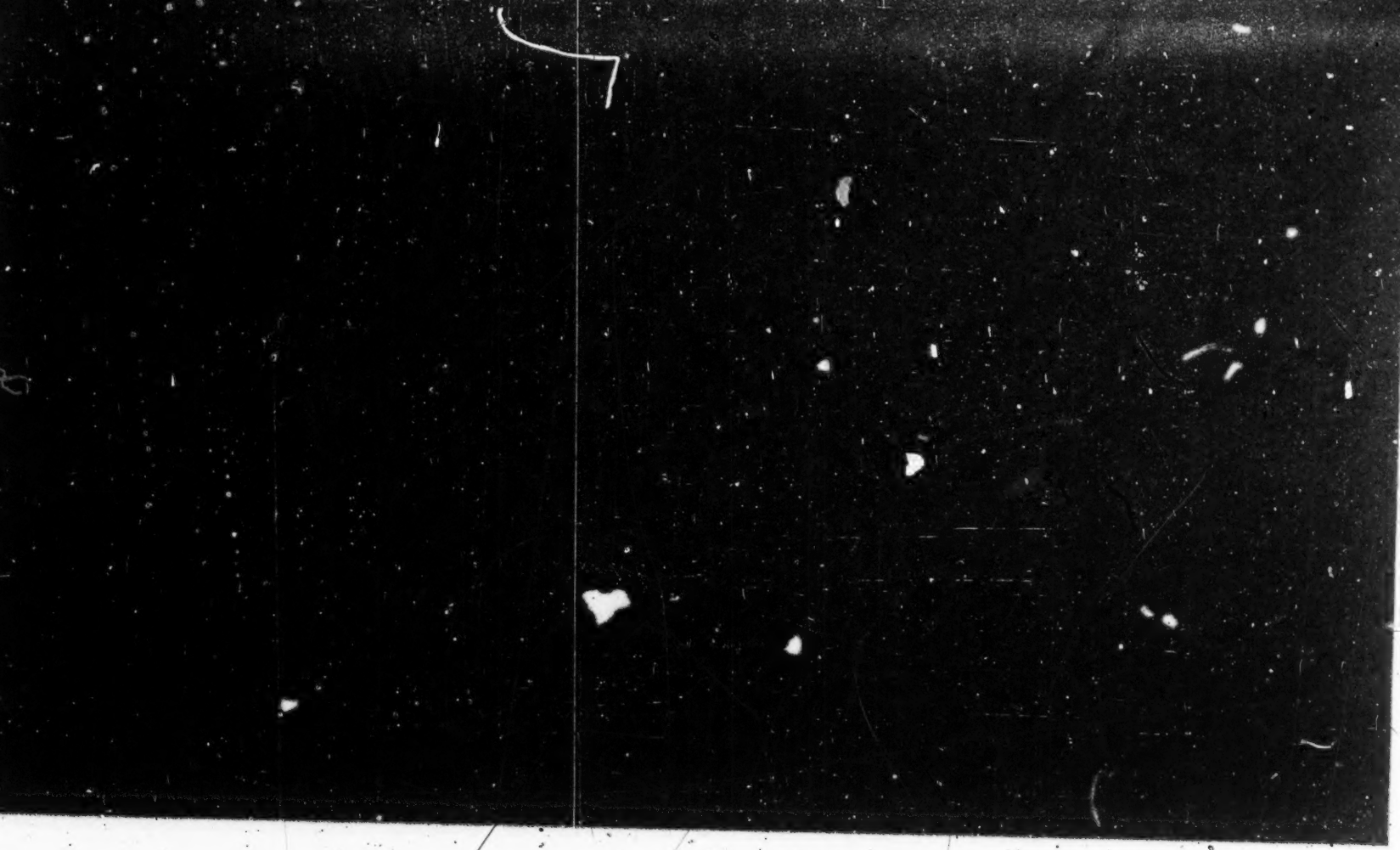
v.

ERNEST O. THOMPSON, ET AL., RESPONDENTS

APPLICATION FOR LEAVE TO FILE BRIEF, AND BRIEF OF INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DANIEL W. KNOWLTON,
Chief Counsel.

E. M. REIDY,
Assistant Chief Counsel,
Of Counsel.



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Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, by its Chief Counsel, respectfully requests leave of the Court to file brief in support of the petition for certiorari, heretofore filed herein. The interest of the Commission in having this Court review the decision with respect to which the petition is made and its suggestions as to some of the important considerations involved in that decision are set forth in the brief hereto attached.

DANIEL W. KNOWLTON,
Chief Counsel.

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BRIEF OF INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The Commission respectfully submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Fifth Circuit, dated April 12, 1938, review of which is sought by this petition, is reported in 95 F. (2d) 937, under the title of *Thompson et al.* v. *McDonald*. By this decision, the Circuit Court of Appeals reversed the action of the District Court in issuing an injunction against Thompson and others enjoining them from interfering with petitioner's business of transporting freight by motor vehicle in interstate commerce. In so doing we feel

that the Circuit Court of Appeals construed the Motor Carrier Act of 1935, imposing important duties upon the Interstate Commerce Commission, in such a manner as to seriously interfere with and impede performance by the Commission of its duties under this Act, especially if followed by other lower courts. It is thought that a decision by the Court at this time will serve as a guide-post to the Commission and to lower courts.

FACTS

The pertinent facts are:

Petitioner had been regularly operating in interstate commerce by motor vehicle, and for many years prior to June 1, 1935, and at all times since that date, he was, and is now, engaged in the business of transporting property through and between the States of Texas and Oklahoma and between intervening points situated in other states. Respondents, E. O. Thompson, C. V. Terrell, and Lon A. Smith, constitute the Railroad Commission of Texas, and W. D. Hood, W. B. Renfro, and Tom Miller, are employees of the Railroad Commission engaged in the enforcement of laws of that state. In the conduct of such transportation petitioner had used within the State of Texas federal highways Nos. 75, 77, 80, 81, 90, 281, and 290, which are federal-aided highways.

On January 16, 1936, after the Motor Carrier Act of 1935 had become effective, petitioner, as the operator of a common-carrier truck line, had a

truck loaded with interstate freight stopped by respondents at or near Conroe, Texas, and the driver of the truck was arrested and thrown into jail because he did not hold a state interstate certificate of convenience and necessity, pursuant to a law of the State legislature passed in 1931, which provides in part as follows:

> SECTION 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.

In addition to the arrest of this particular driver, respondents had issued orders to all inspectors of the State Commission to arrest all of petitioner's drivers and to stop his operations.

Alleging the foregoing and other facts, petitioner applied to the District Court for injunctive relief, and in this connection stated in his complaint that he had complied with all applicable laws of the State of Texas, including meeting the requirements for the issuance to him by the state of license tags, etc., and with all other police requirements of that state. The petitioner alleged that by the Motor Carrier Act of 1935, the sole and exclusive power to regulate interstate commerce was vested in the Interstate Commerce Commission and that under the provisions of said Act he had

applied to the Commission for a certificate of public convenience and necessity to so operate. He further alleged that he would be entitled to receive such a certificate as a matter of right under what is known as the Grandfather Clause, Section 206 of said Act, in that petitioner was in "bona fide" operation on June 1, 1935.

The District Court sustained petitioner's contention; this decision was reversed by the Circuit Court of Appeals for the Fifth Circuit and in its decision construing the Federal law, that Court said, referring to the Motor Carrier Act of 1935:

> Moreover, said Act does not provide that every person who shall receive a certificate of public convenience and necessity *shall be entitled to the use of the various highways of the state,* but the said Act prohibits anyone engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission. The Interstate Commerce Commission under the Act has the power and exclusive authority to pass upon such applications and to refuse them. If it should refuse one, then such applicant would not be permitted to engage in interstate commerce. This is made clear by the Act. That provision, however, is not in direct conflict with the provisions of the Motor Truck Laws of the State of Texas which require the Railroad Commission of the State of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be en-

dangered if there is an excessive amount of traffic on the highways. *The determination of that question has been left to the states.* [Italics ours.]

The questions presented by this case and upon which review is sought, may be summarized as follows:

1. Is the regulation of interstate commerce by carriers using the highways of a state a joint regulation by the state and by the Federal Government so far as certificates of public convenience and necessity are concerned?

2. Did not the Motor Carrier Act of 1935 supersede the Texas Motor Truck Law of 1931 in respect of the granting of certificates of convenience and necessity?

ARGUMENT

I

The Motor Carrier Act, 1935, occupies the field of regulation of interstate commerce by motor carriers and excludes state power of regulation in the matter of certificates of public convenience and necessity in interstate commerce

By the Motor Carrier Act, 1935, Congress entered for the first time upon the field of regulation of motor carriers operating in interstate commerce upon the highways of the nation. That it intended to adopt at one time a comprehensive regulatory system for such carriers is evident from an examination of the Act. Specific jurisdiction is given

the Commission in the matter of rates, as to reasonableness and equality of treatment, and as to the establishment of joint rates and divisions thereof between participating carriers; over issuance of certificates and permits authorizing operations in interstate commerce; over the making of reports, the keeping of uniform accounts and records, over mergers and consolidations, adequacy of service, qualifications and hours of service of employees and safety of operations.

It is not surprising that the entry at one time by the national government into the regulation of a class of interstate commerce long left to the permissive control of the several states should provoke consideration as to the efficacy and desirability of national and uniform control as opposed to a local and varying regulation. The legal principles, however, arising out of such an occupation by the national government of its appropriate sphere are settled.

As stated in *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412,

> It is of course settled that when Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state laws upon the same subject matter are superseded. (P. 417.)

Again, in *Chi., R. I. & P. Ry.* v. *Hardwick Elevator Co.,* 226 U. S. 246, in a case considering the validity of the Minnesota reciprocal demurrage law in the light of the Interstate Commerce Act dealing gen-

erally with the subject of delivery of cars, this Court said:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. (P. 435.)

That the entry of the national government into the field of regulation of interstate commerce will

exclude state power thereover, as to all matters coming within the general purposes of the federal legislation is made clear in a number of decisions of the Court.

In *N. Y. Cent. R. R. Co.* v. *Winfield,* 244 U. S. 147, a New York workmen's compensation act was held inapplicable to railroad employees engaged in interstate commerce, because of the Federal Employer's Liability Act. The federal act purported only to change the rules of liability in negligence cases, while the New York act provided for liability regardless of negligence. It was argued that both acts might stand, as they covered different fields. This the court denied, saying:

> * * * If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.

In *Kansas City So. Ry.* v. *Van Zant,* 260 U. S. 459, the Hepburn Act of 1906, prohibiting free railroad passes for interstate journeys, except to a limited class of persons, was held to nullify all state laws pertaining to liability for injuries sustained by persons while using such passes. Thereafter liability in such cases is determined by Federal

law, although the free pass law made no reference to liability.

Prior to 1910, the liability of telegraph companies for negligence in sending or delivering messages was determined by local law, fixed in many states by statutes. The Mann-Elkins Act of 1910, brought telegraph companies under the general provisions of the Interstate Commerce Act relating to uniformity of rates and equality of service. No provision in the act pertained to liability for negligence, but the Supreme Court held that in view of the general purposes of the act, state laws covering liability were invalid from the time of the entry of the National Government into the field of regulation. It said:

> We think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subject to the control of divergent and it may be conflicting local laws.

Postal Tel. Co. v. *Warren-Godwin L. Co.*, 251 U. S. 27.

To the same effect is *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, where the court said:

> The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved powers of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of non-action by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.
>
> As the result of doing so, we are of the opinion that the provisions of the statute bringing telegraph companies under the Act * * * so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly, an interstate telegram * * *.

In the present case, the purposes of Congress have not been left to surmise but have been expressed in the Act under a section (202) entitled "Declaration of Policy and Delegation of Jurisdiction." The aim to establish a national highway system with central regulatory control, as opposed to a series of state wide systems is evident in the declared purpose "to develop and preserve a high-

way transportation system properly adapted to the needs of the commerce of the United States and of the national defense."

It is further declared to be the purpose of Congress in Section 202 (a) "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

The ability of the motor carrier to operate, without shifting of load, from the premises of the shipper to the premises of the consignee has to date constituted its primary advantage. By this means it has given a service not hitherto rendered by other carriers. In saving in cost of expensive packing and crating, and elimination of supplementary pick up and delivery service, it has been able to render an economical and efficient service. Local variations in laws and regulations, however commendable their purposes, will have the necessary effect of destroying the advantages of motor transportation which it is the declared purpose of Congress to protect.

A degree of uniformity in state regulations, may of course be obtained by voluntary action of the several states. But the recognition of state power in these matters necessarily recognizes a considerable range of legislative discretion. And variations in state purposes and policies will be sufficient to substantially obstruct the development of a na-

tional highway system of transportation which the national act seeks to build up.

It is apparent that state power of control, even in a negative manner, that is, by denying a certificate, in the matter of certificates of public convenience and necessity for operations in interstate commerce, is in direct conflict with the expressed purposes of the Motor Carrier Act, and will serve to render difficult of attainment specific results which the Commission is directed to obtain.

The foregoing is not to argue that complete uniformity in all matters may be attained at once on a national scale. Nor is it to argue that local needs in the matter of safety of operation and preservation of the highways may be ignored. The Motor Carrier Act, in its provisions for administration by joint boards composed of state authorities, is ample provision for the protection of such local interests. The purpose of Congress to approach uniformity in operations and equality of treatment of the public without regard to state lines, by means of a centralized regulatory authority rather than by appeal to voluntary state action is manifest throughout the act. In all these matters there is necessarily involved and implied a national control of the factors necessary to bring about the results aimed at.

Further than this, in Section 202 (c) of the Motor Carrier Act, Congress undertook to name the powers previously exercised by the states which it

did not desire to touch. The powers of taxation and regulation of intrastate commerce are there expressly reserved for state control. If other matters, including state certificates to operate in interstate commerce, were intended to be reserved for the states, this section was the natural place to so declare.

It seems apparent, therefore, that under the Commerce Clause, the authority of the Interstate Commerce Commission is paramount to any exercise by a State over interstate commerce, especially in a matter as closely related thereto as certificates of public convenience and necessity to operate in interstate commerce. Otherwise, the anomalous situation would prevail of the State possessing a veto authority over matters granted to the Federal Government under the Constitution. It is well settled, however, by your decisions that "there can be no divided authority over interstate commerce." To escape this conclusion, the lower court appears to rest its decision upon the ground that there is no conflict as between the federal and the state laws because the regulations of the State Commission and the operations of state laws go more to safety of the public on the highways, a matter peculiarly within the control of the state. Whatever the underlying grounds, the fact remains that there is a conflict between the Federal and the State Governments on the same subject matter, because it lies within the authority of Texas, in this

case, to nullify any grant of authority given by the Interstate Commerce Commission. And, of course, if Texas has the authority to so nullify, it must be conceded that other states under similar laws could be given similar authority. When we consider the number of motor vehicle operators with vehicles running into two or more states, the possible consequences of such a holding become painfully apparent. Such a holding would make the efficacy of the Federal act rest upon the mere permission of the State. That such is not the law is clear from this Court's decision in *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612–613, where you said:

> The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection

> Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. * * *

While an argument to the contrary could well be made, it may be conceded that before the enactment of the Motor Carrier Act of 1935, the Texas law of 1931 requiring a state certificate of public convenience and necessity before interstate operations could be conducted in that state might be a valid enactment. But it seems clear to us that upon the occupancy of the field by the National Government, conflicting state laws and regulations had to give way. And while the lower court contends there is no conflict, it must be conceded, as a matter of substance, that the Federal act becomes operative, not by its own terms, but by permission of the State.

If certiorari is not granted, the courts of the Fifth Circuit will be bound by the decision under review, and it is likely that the denial of this writ will influence courts in other circuits having similar problems.

This case presents considerations which have a vital bearing upon the future course of action of the Commission as to the extent of its powers to grant certificates of public convenience and neces-

sity under the Motor Carrier Act, and it is of importance in the proper administration of the duties imposed upon it that its power and authority should be defined by this Court, in the respect that it is involved in this case.

Respectfully submitted.

E. M. REIDY,
Assistant Chief Counsel.
DANIEL W. KNOWLTON,
Chief Counsel,
For the Interstate Commerce Commission.

OCTOBER 1938.

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